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ARTICLE

EDWARD DOUGLASS WHITE'S USE OF ROMAN AND CANON LAW: A STUDY IN THE SUPREME COURT'S USE OF FOREIGN LEGAL CITATIONS

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I. INTRODUCTION

The United States Supreme Court has been engaged in an increasingly fractious debate for the last several terms over the role foreign legal sources should play in decisions in which the foreign sources do not control the outcome of a particular case. This debate might be said to have received critical impetus in the 2002 decision of *Atkins v. Virginia*.¹ In that case, Justice John Paul Stevens, writing for the majority, argued that subjecting the mildly mentally retarded to the death penalty violated evolving standards of decency as reflected not only in legislative and judicial action among the fifty states but as found in the law of the "world community."² This statement drew a rebuke from Justice Antonin Scalia. The legal norms of the "world community," Justice Scalia wrote, "[are] irrelevant."³ The world community's "notions of justice are (thankfully) not always those of our people."⁴

This debate has replicated itself, in more heated terms, in succeeding Supreme Court terms. In 2003's *Lawrence v. Texas*,⁵ the Supreme Court's majority opinion, authored by Justice Anthony Kennedy, made use of recent European developments in justifying the Court's judgment that Texas's prohibition on sodomy was unconstitutional:

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1. 536 U.S. 304 (2002).

2. *Id.* at 316 n. 21.

3. *Id.* at 347–48 (Scalia, J., dissenting) (quoting *id.* at 316 n. 21).

4. *Id.* at 348 (Scalia, J., dissenting).

5. 539 U.S. 558 (2003).

The European Court of Human Rights . . . [and] [o]ther nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries.⁶

Again, Antonin Scalia raised his voice in spirited protest. Kennedy's majority opinion was selective in its choice of foreign law, Scalia asserted, disregarding "the many countries that have retained criminal prohibitions on sodomy."⁷ More fundamentally, however, the use of foreign sources of law to decide a case of this sort is "meaningless dicta" and "[d]angerous dicta, . . . since 'this Court . . . should not impose foreign moods, fads, or fashions on Americans.'"⁸

The 2004/2005 term witnessed the same combatants doing battle over the same issue of the relevancy of foreign law, this time in the context of a case that challenged the constitutionality of state laws authorizing the trial of juveniles for capital crimes.⁹ Writing for the majority, Justice Kennedy looked to "Article 37 of the United Nations Convention on the Rights of the Child, which every country in the world has ratified save for the United States and Somalia."¹⁰ Kennedy also considered amici briefs submitted by European Union and the Human Rights Committee of the Bar of England and Wales.¹¹ He concluded, "It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty"¹²

Justice Scalia heaped scorn on this pattern of reasoning: "The Court . . . proclaims itself sole arbiter of our Nation's moral standards—and in the course of discharging that awesome responsibility purports to take guidance from the views of foreign courts and legislatures."¹³ "[T]he basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand."¹⁴ Indeed, Scalia noted, the Court's majority did not really believe this proposition to be

6. *Id.* at 576–77.

7. *Id.* at 598 (Scalia, J., dissenting).

8. *Id.* (Scalia, J., dissenting) (quoting *Foster v. Florida*, 537 U.S. 990, 990 n. * (2002) (Thomas, J., concurring)). In a second case dating to the 2003 term, *Grutter v. Bollinger*, 539 U.S. 306 (2003), Justice Ruth Bader Ginsburg made use of international sources of law in her concurrence justifying race-based affirmative action programs: "The Court's observation that race-conscious programs 'must have a logical end point' . . . accords with the international understanding of the office of affirmative action." *Id.* at 344 (Ginsburg & Breyer, JJ., concurring) (citing *id.* at 342). Justice Ginsburg went on to consider the "International Convention on the Elimination of All Forms of Racial Discrimination," of which the United States is a signatory. *Id.*

9. *Roper v. Simmons*, 543 U.S. 551 (2005).

10. *Id.* at 575.

11. *Id.*

12. *Id.* at 578.

13. *Id.* at 578 (Scalia, J., dissenting).

14. *Id.* at 608.

true.¹⁵ If it did, it would act to modify the nation's abortion laws to conform to international standards.¹⁶

The justices have not only waged this battle in the course of their opinions; they have chosen various public fora to engage one another. In 2002, Justice Sandra Day O'Connor lauded the new globalized world in which we find ourselves.¹⁷ In this new context, the law of other nations should be given greater recognition: "Although international law and the law of other nations are rarely binding upon our decisions in U.S. courts, conclusions reached by other countries . . . should at times constitute persuasive authority in American courts. This is sometimes called 'transjudicialism.'"¹⁸

The next year, addressing the same audience, Justice Stephen Breyer advanced similar claims.¹⁹ The law of other nations, Breyer asserted, can be usefully consulted for the lessons that might thereby be imparted: "[W]e find an increasing number of issues, including constitutional issues, where the decisions of foreign courts help by offering points of comparison."²⁰ Ultimately, Breyer waxed enthusiastically, we all share almost universally held aspirations for peace, prosperity, and freedom, which might be advanced through "judicial institutions."²¹ "The force of this aspiration," Breyer continued, "I hope and believe, is virtually irresistible."²²

Justice Scalia, on the other hand, has asserted the paramount values of representative democracy and a concomitant judicial modesty and respect for the popular will. In a speech delivered at the Gregorian University in Rome, in 1996, Scalia announced his support for "dogmatic democracy."²³ "The whole theory of democracy," Scalia asserted, "is that the majority rules."²⁴ As a judge, Scalia has considered himself to be bound by this simple dictum. It is the premise upon which he has grounded both his commitment to an originalist interpretation of the United States Constitution and his analysis of statutes.²⁵ It is also the premise that governs his rejection

15. *Id.*

16. *Id.* at 625 (Scalia, J., dissenting) ("And let us not forget the Court's abortion jurisprudence, which makes us one of only six countries that allow abortion on demand until the point of viability.").

17. Sandra Day O'Connor, *Keynote Address*, 96 Am. Socy. Intl. L. Proceedings 348, 349 (2002).

18. *Id.* at 350.

19. Stephen Breyer, *Keynote Address*, 97 Am. Socy. Intl. L. Proceedings 265 (2003).

20. *Id.* at 266.

21. *Id.* at 267.

22. *Id.*

23. Antonin Scalia, *Of Democracy, Morality, and the Majority*, in 26 *Origins* 82, 88 (June 27, 1996).

24. *Id.*

25. Scalia's commitment to "textualism"—which holds that statutes must be interpreted only in terms of their objectively understandable language to the exclusion of considerations of legislative intent—reflects his larger commitment to democracy. In his typically pungent manner, Justice Scalia explained: "It is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than

of foreign law as a legitimate source for American judicial reasoning. Indeed, for Scalia, the use of foreign law as persuasive authority squarely implicates the very legitimacy of the judicial system.²⁶

I do not aspire in this paper to resolve this controversy. Rather, my intention is to shed some indirect light on the debate through an analysis of the uses to which Roman and Canon Law were put by Chief Justice Edward White, who served on the United States Supreme Court from the 1890s to the early 1920s. The contemporary debate over foreign law's relevancy, after all, is nothing more or less than a debate over the proper sources of law for judicial decision making. The nature of this debate, therefore, makes past Supreme Court practice at the very least a useful guidepost and point of comparison.

And few American Supreme Court justices were more original in their use of legal sources than Edward Douglass White. Appointed associate justice in 1894 and elevated to the position of Chief Justice in 1910, White was unique among American justices in being a Louisiana lawyer and trained civilian. Unlike his contemporaries—and unlike nearly all who have served on the Supreme Court—White was conversant, as a matter of training and practice, in the language and sources of Roman and canonical jurisprudence, broadly understood as embracing not only the law of ancient Rome but also the living systems of the European Continent.²⁷ This paper is concerned with the ways in which he drew upon that learning to demonstrate the universality of the rule for which he is arguing.

II. ROMAN AND CANON LAW AND THE UNIVERSALITY OF LEGAL EXPERIENCE IN THE OPINIONS OF EDWARD DOUGLASS WHITE

This article makes several commonplace assumptions about judicial opinions. First, it is assumed that a judicial opinion is intended by its author as a statement regarding the law and facts necessary to the resolution of the case. This is not to say that there is only one right resolution or that judges cannot disagree. It is entirely possible—indeed, inevitable—that some cases lend themselves to more than one possible outcome and that judges can and

by what the lawgiver promulgated. That seems to me one step worse than the trick the emperor Nero was said to engage in: posting edicts high up on the pillars, so that they could not easily be read.” Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, in *A Matter of Interpretation: Federal Courts and the Law* 17 (Amy Gutmann ed., Princeton U. Press 1997) (quoted in Caleb Nelson, *What Is Textualism?* 91 Va. L. Rev. 347, 352 n. 13 (2005)).

26. Kenneth Anderson, *Squaring the Circle: Reconciling Sovereignty and Global Governance through Global Government Networks*, 118 Harv. L. Rev. 1255, 1307 (2005) (citing a foreign case as persuasive authority rather than as mere rhetorical flourish raises the deep issue of legitimacy).

27. One can find a quick summary of this expansive meaning of Roman law, and its impact over two millennia of European legal development, in Harold J. Berman & Charles J. Reid, Jr., *Roman Law in Europe and the Jus Commune: A Historical Overview with Emphasis on the New Legal Science of the Sixteenth Century*, 20 Syracuse J. Intl. L. & Com. 1, 1 (1994).

do have reasonable, good-faith disagreements over their proper resolution. All that is meant by this assumption is that judges find it necessary to explain themselves by means of written opinions and that they must justify themselves by citing to and discussing relevant law and fact.

It is further assumed, as a corollary to the first assumption, that opinions are intended to be persuasive. Every contested case, after all, necessarily features at least two alternative readings of the law and facts. In light of this consideration, opinions must be persuasive to a variety of audiences. They must persuade, first of all, the opinion's author as well at least some portion of the other members of the court. But opinions should also be persuasive to the court's readership. Ideally, litigants and their lawyers will leave the courthouse, if not satisfied with the outcome, at least convinced that the court did its best to arrive at a reasonable outcome. Furthermore, the practicing bar should also come away convinced that the court has arrived at an intellectually satisfying defense of its judgment. Policymakers and other educated and interested readers should be able to reach similar conclusions. This is so even where a judge is a lonely dissenter. Indeed, a judge dissenting from established legal doctrine might have so abandoned hope in persuading fellow justices that he or she is writing only in the hope of persuading a future generation of the rightness of the cause. But—the rejoinder follows—posterity, too, is a proper audience for a judge.

It is assumed, finally, that judges are interested in employing a certain economy in their writing. It is an unusual judge who would admit that he or she has included in an opinion material that is neither necessary nor useful to the case's resolution. While judges might distinguish between dicta and holding in the writings of other courts, they will seldom admit that portions of their own opinions should count only as mere dicta—surplusage that their readers would do well to disregard.

These considerations and assumptions are useful to keep in mind when approaching the use of Canon and Roman law by a judge like Edward Douglass White. They keep us focused on the task at hand—understanding the functions that his repeated references to these ancient sources of foreign law were intended to have. We proceed with the working assumptions that White was not engaged in mere window dressing, adornment, or spectacle, but that he really intended to produce functional, useful opinions that relied on the relevant facts and law and that were persuasive to the various audiences described above.

Although Chief Justice White used citations to Roman and Canon law for several distinct purposes,²⁸ this paper considers his invocations of these sources as a means of demonstrating the universality of the rule for which

28. In a forthcoming book, I will explore Justice White's additional uses of Roman and Canon law. He invoked them as a sort of rhetorical device, and as sources of particular legal rules. He also cited Roman and Canon law to support arguments for law reform.

White is arguing. In the three cases I discuss below, White is challenging his readers to consider the broad universe of legal experience and the various forms of legal reasoning found in other nations and contexts. In short, he is attempting to give his conclusions a certain air of inevitability—millennia of legal history point in the direction White has chosen and it thus makes sense to follow this inevitable course.

These cases are significant also because White not only uses Roman law rhetorically, to demonstrate the universality of a particular rule, but because he actually derived governing principles of law from Roman and canonical sources. Indeed, at points where American case law stands against the desired outcome—provided the interests are sufficiently large—White will adopt and adapt the principles of a foreign legal system to the problem that has presented itself.

An investigation of White's opinions has implications for understanding the prevailing jurisprudence of the United States of one hundred years ago. By jurisprudence, of course, is meant an era's predominant understanding of how to answer the question, "What is law?" American jurists today would answer this question very differently than they would have a century ago.

A. *Coffin v. United States*²⁹

Coffin v. United States involved a prosecution for bank fraud. Among other grounds for appeal, petitioner-defendants asserted that their convictions should be reversed because the lower court failed to instruct the jury on the presumption of innocence that the defendants enjoyed, even though the court had instructed the jury that they should convict only if satisfied beyond a reasonable doubt that the defendants were guilty.³⁰ An instruction on reasonable doubt, the petitioners essentially argued, was no substitute for reminding the jury that they should not look upon the defendants as guilty men. Writing for the Court, the young Associate Justice White held in favor of petitioners and commenced his treatment of the subject of presumption of innocence with a broadly-worded principle: "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."³¹

Taken as an axiom, understood as a foundation stone of criminal justice, the presumption of innocence, as articulated by White, needed no further justification in logic. Axioms, after all, are by definition the starting points of reasoning and cannot themselves be further justified.

29. 156 U.S. 432 (1895).

30. *Id.* at 452–53.

31. *Id.* at 453.

White nevertheless felt the need to justify his broad assertion on behalf of the presumption of innocence not by some further syllogism but by an examination of its antiquity and universality. And the means he chose for this exercise was, first of all, a searching examination of the texts of the classical and postclassical Roman law and of medieval Canon law.

At least five texts of Roman law, White asserted, stood in favor of the presumption of innocence. His first text, a decree issued jointly by the emperors Gratian, Valentinian, and Theodosius, and dated to the year 382, instructed those who sought to bring criminal charges not to do so unless their accusations could be supported by suitable witnesses, the clearest form of documentation, or "undoubted evidence clearer than light."³² White followed this text with a passage from Justinian's *Digest* indicating that it was the Emperor Trajan's wish, expressed to one of his representatives, that no one should be condemned in his absence, for "it was better that the crime of a culprit remain unpunished than that an innocent person be condemned."³³

White followed these passages with three maxims of law drawn from the final book of Justinian's *Digest*. "Always in doubtful matters," the first maxim asserted, "the kinder interpretation should be preferred."³⁴ "In criminal matters," the second maxim averred, "the more mild interpretation is to be observed."³⁵ A final maxim asserted: "In a doubtful matter it is no less just than it is safe to follow the more generous interpretation."³⁶

None of these passages exactly added up to a presumption of innocence. The first text, the late fourth-century imperial decree, was nothing more than an admonition that one who brings a criminal accusation must ensure that the evidence he is about to present is convincing. It could as easily have supported the respondents' claim that an instruction on reasonable doubt, standing alone, was entirely sufficient even in the absence of

32. *Codex* 4.19.25 (Gratian, Valentinian & Theodosius). White cites this text at *Coffin*, 156 U.S. at 454. His citation contains a slight error, citing to title twenty of book four of the *Codex* instead of title 19. I have furnished my own translation of the text, as opposed to Justice White's.

33. *Digest* 48.19.5 (Ulpian). Again, the translation is my own. White cites this text at *Coffin*, 156 U.S. at 454.

34. *Digest* 50.17.56 (Gaius). The Latin is highly abbreviated and reads: "Semper in dubiis benigniora praefenda sunt." White proposed translating the passage: "In all cases of doubt, the most merciful construction of facts should be preferred." *Coffin*, 156 U.S. at 454. The word *benigniora*—"more benign"—might embrace the concept of mercy, but it might just as easily embrace the concepts of "expansiveness" or "generosity." I have used the word "kinder" to relate its meaning. White also narrows the meaning of the maxim when he speaks of "construction of facts." In fact, the maxim makes no mention of facts; the word *dubiis* can best be translated as "doubtful matters." The studied breadth and ambiguity of the maxim, indeed, suggests rather that it is equally applicable to interpretations of law as well as facts.

35. *Digest* 50.17.155.2 (Paulus). Again, I have used my own translation. See *Coffin*, 156 U.S. at 454, for White's, which differs slightly from my own.

36. *Digest* 50.17.192.1 (Marcellus). I have here translated the phrase *benigniore interpretatorem* "more generous interpretation," although the word "kinder," which I have previously used for *benigniore*, would also work well here. See *supra* n. 34. Again, I have differed from White's rendering of the passage. See *Coffin*, 156 U.S. at 454.

anything to further a presumption of innocence. Trajan's instruction—White's second text—might be read as simple mistrust of his subordinates: better that a guilty person go free than his subordinates convict someone wrongly. Its meaning might be extended to encompass a general concern for the truthfulness of the proceedings but, again, it is not a general presumption of innocence. The same can be said for the maxims of law that White cites. The first and third maxims were written in general terms and might embrace both civil and criminal proceedings. The second maxim, admonishing that the "more mild interpretation be observed" in criminal matters, did not by its terms embrace a presumption of innocence. It might as easily be read as counseling that a lesser penalty be imposed on a guilty party where the law so allowed. White's own citations, in other words, could be seen as supporting his endorsement of a presumption of innocence in only a most general manner.

White next considered a late Roman literary text and a text of medieval Canon law. Ammianus Marcellinus, the Roman source to which White turned, was a late fourth-century man of letters from the eastern half of the empire, who wrote a history intended to tell the story of Rome from the death of the emperor Nerva (96 CE) to the year 378. Only the last part of this work survives, which recounts the period between the years 351 and 378.³⁷ A pagan in a world that was becoming increasingly Christian, Ammianus put considerable distance between himself and the new religion, professing fear that regimes that immersed themselves too much in religion could come to naught.³⁸ Rome remained for Ammianus the Eternal City, the repository of traditional (pre-Christian) virtue and the hope for the future liberty of humankind.³⁹ In assuming a stance of this sort, Ammianus was probably the last Roman writer able to adopt an historiographical stance that exalted the glorious pagan days of old Rome at the neglect of its transformation into a central home of the new Christian faith.

In particular, Ammianus celebrated the life of the Emperor Julian (reigned 361–363).⁴⁰ Julian, the "flawed hero" of Ammianus's work,⁴¹

37. A valuable guide to Ammianus's life is the essay by Arnaldo Momigliano, *The Lonely Historian Ammianus Marcellinus*, reprinted in Arnaldo Momigliano, *Essays in Ancient and Modern Historiography* 127 (Wesleyan U. Press 1977). For purposes of this article, I have consulted the three-volume Loeb Classical Library edition. See Ammianus Marcellinus, *Rerum Gestarum Libri Qui Supersunt* (John C. Rolfe ed. & trans., Harvard U. Press 1950).

38. E.D. Hunt, *Christians and Christianity in Ammianus Marcellinus*, 35 *Classical L.Q.* 186 (1985).

39. John Matthews, *Ammianus and the Eternity of Rome in The Inheritance of Historiography*, 350–900, at 17 (Christopher Holdsworth & T.P. Wiseman eds., Exeter U. Publications 1986).

40. John Matthews, *The Roman Empire of Ammianus* 465, 468–69 (Johns Hopkins U. Press 1989).

41. Hunt, *supra* n. 38, at 187. Another scholar, noting the emphasis that Ammianus placed on Julian's virtuous qualities is less reserved than Hunt in characterizing Julian. According to R.C. Blockley, Julian was the "ideal emperor." See R.C. Blockley, *Ammianus Marcellinus: A Study of His Historiography and Political Thought* 73–103 (Latomus 1975). Blockley concludes: "Ammi-

came to the imperial throne after half a century of Christian rule. He repudiated the Christian practices of his immediate predecessors and set about reconstructing the ancient pagan glories of Rome, although this enterprise was cut short by Julian's death on military campaign in Persia.

White's reliance on Ammianus demonstrates the lengths to which he would go to universalize the presumption of innocence. As White picks up the story, the year is 359 and Julian had just become "Caesar" of the Western empire but had not yet consolidated all imperial power in his hands.⁴² Temporarily headquartered in Gaul, Julian sought to administer fair-minded justice to all within his rule.⁴³ Numerius, the former governor of Gaul, had been accused of official misconduct and had denied the charge.⁴⁴ His accuser, Delphidius, declared, "Can anyone, most mighty Caesar, ever be found guilty, [if denial suffices for acquittal]?"⁴⁵ Julian "wisely" answered, "Can anyone be proved innocent, if it be enough to have accused him?"⁴⁶

It is in this passage, drawn from a pagan panegyric celebrating the virtues of an emperor known as "the Apostate" in Christian sources, that White came closest to identifying a real presumption of innocence at work in ancient Rome.⁴⁷ White, a classically trained Catholic, undoubtedly knew this history and relished the chance to find support for the proposition he was defending even in source material seemingly hostile to his faith—all the better to establish the universal truth of the presumption of innocence.

White's reference to a medieval canonistic source, however, contains an inexplicable error that, fortunately, made no difference to the case White was arguing. Misattributing a text of Pope Innocent III (which was found in Pope Gregory IX's *Liber Extra*, to Gratian's *Decretum*, and published half a century before Innocent lived and worked), White was nevertheless able to identify an important source for his claims in favor of a presumption of innocence.⁴⁸ Pope Innocent wrote that one suspected of heresy should not be condemned on the basis of presuppositions and groundless assumptions,

anus did not set out to compose a panegyric upon Julian. If he seems to have produced one, it is because he honestly thought that the Emperor approached his ideal." *Id.* at 102.

42. *Coffin*, 156 U.S. at 491.

43. Marcellinus, *supra* n. 37, at vol. I, bk. XVIII, 402–05.

44. *Id.* at 404–05.

45. *Id.* ("Ecquis, florentissime Caesar, nocens esse poterit usquam, si negare sufficiet?").

46. *Id.* ("Ecquis ait 'innocens esse poterit, si accusasse sufficiet?'").

47. *Coffin*, 156 U.S. at 460–61.

48. X. 2.23.14. Gratian's *Decretum* is among the most mysterious of all medieval legal texts. We are not certain who Gratian was and its date of publication has been fixed at 1140 on the basis of circumstantial evidence, although even this date has not gone unchallenged. The most recent book-length assessment of Gratian's work is Anders Winroth, *The Making of Gratian's Decretum* (Cambridge U. Press 2000). The *Liber Extra*, promulgated by Pope Gregory IX in 1234, was an official collection of papal decretal letters, issued for the most part in the ninety or so years that had passed since the appearance of Gratian's *Decretum*. See James A. Brundage, *Medieval Canon Law* 53–55 (Longman Group Ltd. 1995). White cites this canonical text in *Coffin*, 156 U.S. at 455.

but only on the basis of real evidence.⁴⁹ Once again, White's source does not exactly support a presumption of innocence. But the primary purpose of the text—condemning misplaced reliance on presumptions of guilt instead of engaging in a real search for evidence—provided ample support for White's larger argument that we should presume the innocence of those accused but not convicted of criminal wrongdoing.

Roman and Canon law were not the only foreign sources that White consulted. He read and cited widely among the sources of the English common law as well to justify the outcome in *Coffin*.⁵⁰ But reliance on the common law is an expected analytical move by a Supreme Court justice. The American legal system is, after all, derived from the common-law system of Great Britain and still relies on the common law for an understanding of basic terms and concepts. It was thus not through his use of the common law, but through his use of the Roman and Canon law that White demonstrated the universality of the position for which he was arguing.

This is not to say that White's treatment was unproblematic. Understood as an historical excursus into the presumption of innocence, White's efforts clearly came up short. His texts can be said to support a general notion of due process, a sense of procedural fairness, and a general humanity in the application of legal norms to civil and criminal defendants. They do not, however, support the supposed antiquity of the presumption of innocence. Indeed, except for the passage from Ammianus Marcellinus, White's sources demonstrate precisely the opposite, revealing the absence of a clearly articulated presumption of innocence in the ancient and medieval world. But White's work was not primarily an historical inquiry. He was not seeking to provide a fastidiously accurate account of the ancient law, to contextualize it, or to understand its precise boundaries. Rather, White was engaged in a creative use of historical precedents and foreign law to justify the enshrinement of an essentially new presumption in the constitutional law of the United States.⁵¹

White was taken to task by some of his contemporaries for his analysis of the presumption of innocence. Two years later, in the Storrs Lectures delivered at Yale Law School, James Bradley Thayer declared that White's opinion in *Coffin* had "sadly misimproved" the law of evidence through its articulation of a presumption of innocence.⁵² The *Coffin* Court's effort to distinguish between the reasonable doubt evidentiary standard and the pre-

49. X. 2.23.14.

50. 156 U.S. at 455–56.

51. White comes close to acknowledging that this was his intention in the following passage: "While Rome and the medievalists taught that, wherever doubt existed in a criminal case, acquittal must follow, the expounders of the common law, in their devotion to human liberty and individual rights, traced this doctrine of doubt to its true origin, the presumption of innocence, and rested it upon this enduring basis." *Id.* at 460.

52. James Bradley Thayer, *The Presumption of Innocence in Criminal Cases*, 6 Yale L.J. 185, 185 (1897).

sumption of innocence so as to make both elements a part of due process of law Thayer criticized as confusing.⁵³ Thayer also criticized White's understanding of the history of the presumption of innocence, although he said nothing about White's use of Roman and canonical citations to support his conclusions.⁵⁴

In recent decades, on the other hand, both courts and commentators have come to appreciate the significance of *Coffin v. United States* as an important step in the development of a robust presumption of innocence in American constitutional law. Citing and quoting from *Coffin v. United States*, the United States Supreme Court in *In re Winship* declared "'axiomatic and elementary'" the presumption of innocence.⁵⁵ The absence of this presumption, the *Winship* Court noted, would result in fundamentally unfair and constitutionally infirm proceedings.⁵⁶ Six years later, in *Estelle v. Williams*, the Supreme Court again quoted the "axiomatic and elementary" language of *Coffin v. United States* to defend the requirement of the presumption of innocence as "a basic component of a fair trial under our system of criminal justice."⁵⁷ As recently as the 2005 term, in *Deck v. Missouri*, Justice White's language in *Coffin* was quoted to reverse a conviction where the defendant appeared shackled in the courtroom during the sentencing phase of his capital trial.⁵⁸ Even though the Court conceded that, strictly speaking, the defendant was no longer entitled to a presumption of innocence since he had already been found guilty of a capital offense, the related concern of "deciding between life and death" was still on the table.⁵⁹ "Accuracy in making that decision" was every bit as crucial as the initial determination of guilt, and prosecutors were thus admonished to avoid the appearance of prejudice.⁶⁰

Coffin v. United States has also figured in dissenting opinions of the United States Supreme Court. Writing in dissent, John Paul Stevens reminded his brethren on the bench "that the presumption of innocence, when uncontradicted, is an adequate substitute for affirmative evidence."⁶¹ For support, he cited *Coffin v. United States*.⁶² Indeed, Justice Thurgood Marshall even quoted from Ammianus Marcellinus when arguing for the presumption of innocence.⁶³

53. *Id.* at 209–11.

54. *Id.* at 206–07, 210.

55. *In re Winship*, 397 U.S. 358, 363 (1970) (quoting *Coffin*, 156 U.S. at 453).

56. *Id.*

57. *Estelle v. Williams*, 425 U.S. 501, 503 (1976).

58. *Deck v. Missouri*, 544 U.S. 622, ___, 125 S. Ct. 2007, 2013 (2005).

59. *Id.* at 2014.

60. *Id.*

61. *Delo v. Lashley*, 507 U.S. 272, 283 (1993) (Stevens, J., dissenting).

62. *Id.*

63. *U.S. v. Salerno*, 481 U.S. 739, 764 (1987) (Marshall, J., dissenting).

Commentators, too, have embraced *Coffin v. United States*. The case has been understood as the means by which the positive law of the United States integrated within itself the natural law tradition.⁶⁴ The Israeli scholar Rinat Kitai cites *Coffin* as establishing the presumption of innocence as a “fundamental principle of criminal procedure.”⁶⁵ William Laufer has noted that the distinction that *Coffin* drew between the presumption of innocence and the “beyond a reasonable doubt” standard of proof helped to reinforce both principles.⁶⁶ Other commentators have seen *Coffin v. United States* as the starting point for understanding the development of the presumption of innocence as a fundamental postulate of criminal law.⁶⁷ *Coffin*, in other words, represents a fundamental development in the history of American notions of due process and criminal procedure.

It is worth making this point as clearly as possible because *Coffin* is ultimately grounded not on a narrow positivistic understanding of constitutional law, but on an expansive understanding of the western legal tradition and the larger constitutional principles that can be derived from two millennia of experience. Drawing from Roman legal texts and even from Roman literary sources, combining and synthesizing this material with canonistic sources and the historical common law, White articulated a principle that is now taken for granted by American lawyers. It is a principle that did not exist in clearly articulated form in American jurisprudence until 1895. And it is a principle that has at its foundation not only the case law and precedents of the Anglo-American tradition, but the wisdom of the ages.

B. *Cubbins v. Mississippi River Commission*⁶⁸

Early explorers of the lower Mississippi River Valley documented its recurrent floods.⁶⁹ An early twentieth-century historian of the Mississippi identified the portion of the river that was prone to catastrophic flooding: “The delta of the Mississippi River subject to overflow extends from Cape Girardeau, forty-five miles above Cairo, to the Gulf of Mexico, nearly 600 miles in an air line, and varies in width from twenty to eighty miles. Its area amounts to 29,790 square miles.”⁷⁰

64. Joseph C. Cascarelli, *The Presumption of Innocence and Natural Law: Machiavelli and Aquinas*, 41 Am. J. Juris. 229, 231 (1996).

65. Rinat Kitai, *Protecting the Guilty*, 6 Buff. Crim. L. Rev. 1163, 1164 (2003).

66. William S. Laufer, *The Rhetoric of Innocence*, 70 Wash. L. Rev. 329, 343 (1995).

67. See e.g. Damien P. DeLaney, *Better to Let Ten Guilty Men Live: The Presumption of Life—A Principle to Govern Capital Sentencing*, 14 Cap. Def. J. 283, 285 (2002); John T. Rago, “Truth or Consequences” and Post-Conviction DNA Testing: Have You Reached Your Verdict? 107 Dick. L. Rev. 845, 876 n. 8 (2003) (“The presumption of innocence was identified for the first time in *Coffin v. United States*.”).

68. 241 U.S. 351 (1916).

69. Lyle Saxon, *Father Mississippi* 253 (The Century Co. 1927).

70. *Id.*

It was this portion of the Mississippi River, extending from southern Illinois and southern Missouri to the area south of New Orleans, that the Mississippi River Commission was tasked with taming at its creation in 1879.⁷¹ Writing in 1930, an historian of this project described it as “probably . . . the most important piece of flood-control legislation in all of our history.”⁷² As summarized in congressional hearings in 1916, the act creating the commission granted it capacious powers:

[The commission is to] take into consideration and mature such a plan or plans and estimates as will correct, permanently locate, and deepen the channel and protect the banks of the Mississippi River, improve and give safety and ease to the navigation thereof, prevent destructive floods and promote and facilitate commerce, trade, and the postal service.⁷³

In practice, the Mississippi River Commission attempted to impose some degree of coordination over the kind of haphazard flood control and planning that had previously taken place on the lower Mississippi.⁷⁴ In fact, even after the establishment of the commission, jurisdiction over flood control and the building of levees was shared between state and local authorities.⁷⁵ States created levee districts that exercised the powers to tax, to issue bonds, and to condemn property in accord with principles of eminent domain.⁷⁶ The Mississippi River Commission served as the central coordinating agency, to ensure that flood control was effective.⁷⁷

The constitutionality of this effort to control Mississippi River flooding was questioned by litigants in a pair of cases decided three years apart, *Jackson v. United States*⁷⁸ and *Cubbins v. Mississippi River Commission*.⁷⁹ *Jackson* commenced in 1894, asserting that flood control projects had rendered worthless for agricultural purposes several tracts of land comprising three plantations in Adams County, Mississippi.⁸⁰ Plaintiffs sought to recover damages for the value of lost crops, personal property, and the consequent decline in market value of their real estate.⁸¹ The case was brought against the United States government on the theory that the congressional

71. Arthur DeWitt Frank, *The Development of the Federal Program of Flood Control on the Mississippi River* 42 (Columbia U. Press 1930).

72. *Id.*

73. *Id.* (quoting H.R. Comm. on Flood Control, *Hearings 1916*, at 8).

74. Flood control was desperately needed. A reference work on Mississippi flooding, published in 1928, documented extensive flooding in the lower Mississippi in 1897, 1903, and 1912. See Lamar T. Beman, *Flood Control* 47 (The H.W. Wilson Co. 1928). Such flooding continued even after the *Cubbins* case was decided.

75. Frank, *supra* n. 71, at 137.

76. *Id.*

77. Frank describes “[a] movement for Federal control on a larger scale” that took “[a] half century” to accomplish. *Id.* at 157.

78. 230 U.S. 1 (1913).

79. 241 U.S. 351.

80. 230 U.S. at 6–7.

81. *Id.* at 8–9.

authorization that stood behind the Mississippi River Commission and other federal actors, like the Army Corps of Engineers, was responsible for depriving the litigants of the value of their lands and should therefore be liable to make compensation.⁸²

Edward Douglass White, by now promoted to chief justice, wrote the opinion for a unanimous court. A native of the region, his opinion bespeaks a deep intimacy with the topography of the affected area, as he sketched out, in exquisite detail, the various geologic features that characterized the Mississippi River Valley from Cape Girardeau, Missouri, to the point where the river merged its flow with the Gulf of Mexico.⁸³ White went on to reject the plaintiffs' complaints. Indeed, he saw the plaintiffs' cause as little more than special pleading deserving of no judicial protection. Citing and relying on no legal precedent, White concluded:

When accurately fixed, the complaint is but this, that because the claimants had built a levee for the purpose of protecting their lands and which answered that purpose if levees were not built by others to protect their lands, actionable injury would be occasioned claimants when anybody else sought to protect his land from overflow, since to do so would increase the volume of water in the river and raise the flood level to the detriment of claimants.⁸⁴

White then used this assertion as the premise of his larger point: the landowners by constructing levees on their lands had essentially claimed the right to dictate to their neighbors what they may or may not do on their lands.⁸⁵ This line of reasoning, White concluded, was absurd; parties enjoyed the right to protect their own lands from flooding, especially where such actions have been authorized by local laws.⁸⁶ White then took the further step of asserting that what private individuals could do for themselves, the government—acting on behalf of the entire community—might undertake as a cooperative venture without thereby violating private rights.⁸⁷

82. *Id.* at 2–3. The plaintiff-plantation owners had previously constructed levees to protect their farm land, but the integrity of these levees were apparently compromised by the new, more comprehensive structures built by the Mississippi River Commission and the Army Corps of Engineers. *Id.* at 20–21.

83. *Id.* at 3–6.

84. *Id.* at 20–21. White continues:

In its essence, however, this but amounts to saying that because the claimants have built a levee along their property for the purpose of protecting it from overflow in times of high water, they have acquired the right to stereotype the conditions existing at the time they built their levee even to the extent of preventing anyone from subsequently exerting his right to build a levee to protect his land.

Id. at 21.

85. *Id.*

86. *Id.* at 21–22.

87. Would it be said that the claimants would have a resulting right of action in damages because other owners had exerted the very right which the claimants had previously resorted to for the purpose of protecting their own land? If not, upon what imaginary ground can it be said that because a work which was lawful in and of itself,

Thus, without citing a single case or statute, White disposed of the landowners' case through a series of logically structured syllogisms demonstrating the right and responsibility of government to act on behalf of the common good.

Three years later, a similar case was presented to the Court. In *Cubbins v. Mississippi River Commission*, the plaintiff argued that the Mississippi River Commission, directly and indirectly, through reliance on state building projects, caused to be erected a series of levees running the entire length of the Mississippi River from Cape Girardeau to the Gulf of Mexico that flooded his land and caused it to lose all market value.⁸⁸ The flooding caused by the levee system had the effect, the plaintiff averred, of destroying the homes of his tenant farmers and filling good agricultural land with silt and sand, thus making it worthless for the growing of crops.⁸⁹ Further, this was a violation of his legal rights "since he was entitled to the natural flow of the river within its natural high or low water bed free from interference by the acts of the defendants."⁹⁰ The plaintiff accordingly sought injunctive relief against the commission, seeking to prevent it "from further building any levees, from enlarging, strengthening, repairing or doing any act to maintain the levees already built and for general relief."⁹¹

White formulated a response to the plaintiff's cause of action by looking most immediately to Roman law. His transition to Roman law was so abrupt as to be jarring. In a single paragraph intended to introduce the reasoning that was to follow, White asserted that the plaintiff's case deserved "a negative answer" on the basis of *Jackson v. United States* and another earlier case.⁹² In further support of this conclusion, White went on to state that it was necessary to consider the case in two distinct aspects: "First, with reference to the rights and obligations of the landowners and the power of the state to deal with the subject; and second, with reference to the power of the United States to erect levees to confine the water for the purpose of improving navigation . . ."⁹³ White immediately followed this rather conventional formulation of the case by stating:

Without seeking to state or embrace the whole field of Roman law concerning the flow of water, whether surface or subterranean, or to trace the general differences between that law, if any,

was done by the United States, therefore responsibility in favor of the claimants was entailed.

Id.

88. 241 U.S. at 359–60. The plaintiff's contention was that by preventing widespread flooding of alluvial plains, the levees increased the overall elevation of the river and that this elevation of the river caused it to overtop the levees from time to time, to the detriment of plaintiff's land. *Id.* at 362.

89. *Id.* at 360–61.

90. *Id.* at 361.

91. *Id.*

92. *Id.* at 362.

93. *Id.* at 363.

as it existed in the ancient law of the continent of Europe whether customary or written, or as it prevailed in France prior to, and now exists in, the Code Napoleon, one thing may be taken as beyond dispute, that not only under the Roman law, but under all the others, the free flow of water in rivers was secured from undue interruption, and the respective riparian proprietors in consequence of their right to enjoy the same, were protected from undue interference or burden created by obstructions to the flow, by deflections in its course, or any other act limiting the right to enjoy the flow, or causing additional burdens by changing it.⁹⁴

At first blush, the second quotation, when immediately following the first, reads almost as a *non sequitur*. Without reference to any governing statute, without even a nod in the direction of prevailing case law, White introduced the subject of Roman law to furnish the relevant principles required for the proper resolution of the case. The second quotation, furthermore, seems to support a result favorable to the plaintiff. It was the plaintiff, after all, who sought to secure the unimpeded flow of water by means of his petition for injunctive relief.

White, however, continued:

But while this was universally true, a limitation to the rule was also universally recognized by which individuals in case of accidental or extraordinary floods, were entitled to erect such works as would protect them from the consequences of the flood by restraining the same, and that no other riparian owner was entitled to complain of such action upon the ground of injury inflicted thereby, because all, as the result of the accidental and extraordinary condition, were entitled to the enjoyment of the common right to construct works for their own protection.⁹⁵

The adverb "universally," repeated twice in a single sentence in the above-quoted passage, is the key to understanding White's invocation of Roman law. He was engaged in the search of universally true legal principles and believed he might find them in Roman law. If it is always and everywhere true that water should ordinarily be allowed to flow unimpeded, then the exception to this rule is equally and universally true that one might protect one's land from "accidental" or "extraordinary" flooding.

The Roman law to which White turned in *Cubbins* was not, in the first instance, the ancient texts of Justinian, but the civilian jurisprudence of France, especially the Code Napoléon and its systematic explication by Charles Demolombe.⁹⁶ White began with Article 640 of the Code Napo-

94. *Id.*

95. *Id.* at 363-64.

96. To speak of the *Code Napoléon* is itself inexact. When most writers speak of the *Code Napoléon* they mean by it the *Code civil*, enacted into law in 1804. In fact, this was "one of five Napoleonic codes," the others being the Commercial Code, the Code of Civil Procedure, the Penal

léon, especially as understood by Demolombe.⁹⁷ This provision of the Code was concerned with the creation of “servitudes arising from the flow of water.”⁹⁸

On its surface, Article 640 seemed precisely opposed to the outcome White wished to achieve. In three sentences, it declared that “inferior lands”—lands that might be downstream or on lower ground—were “compelled to receive” waters that flow naturally from higher ground to which human handiwork has not “contributed.”⁹⁹ A second sentence specified that the owner of the “inferior land” could not construct a barrier to impede such flow.¹⁰⁰ A third sentence added that the owner of higher ground could not do anything to increase burdens on the proprietor of lower ground. The text seemed clear: under penalty of law, private parties ought not to interfere with the free and natural flow of water.

Demolombe’s commentary, however, qualified this seemingly dogmatic rule. While landowners might not be permitted to divert the flow of a river or deepen its bed or to violate in any manner the rights of other landowners, they nevertheless might be able to protect their own property from “accidental and extraordinary” (*accidentels et extraordinaires*) flooding.¹⁰¹ White translated and quoted this text and followed it with a passage from Justinian’s Codex:¹⁰² “*Ripam suam adversus rapidi amnis impetum munire prohibitum non est.*”¹⁰³ White continued by translating and quoting Demolombe at some length:

[E]ven when the effect of the dikes or other works done will be, as is nearly always the case, to render the waters of the river more hostile and damaging to other properties, the owners of which

Code, and the Code of Criminal Procedure. André Tunc, *Methodology of the Civil Law in France*, 50 Tul. L. Rev. 459, 460 (1976).

Charles Demolombe (1804–1888) was the author of a thirty-one-volume systematic study and exposition of the *Code Napoléon*. See Charles Demolombe, *Cours de Code Napoléon* vol. 1–31 (A. Lahure ed., Paris 1880–1882). A brief discussion of Demolombe’s method can be found in Vernon Valentine Palmer, *From Embrace to Banishment: A Study of Judicial Equity in France*, 47 Am. J. Comp. L. 277, 298 (1999).

97. *Cubbins*, 241 U.S. at 364.

98. *Id.*

99. C. civ. art. 640 (“propriétaire inférieur . . . assujettis . . . à recevoir . . . naturellement, sans que la main de l’homme y ait contribué”).

100. *Id.*

101. Charles Demolombe, *Cours de Code Napoléon* vol. 11, 34 (A. Lahure ed., Paris 1882).

102. *Cubbins*, 241 U.S. at 364. Translating from Demolombe, White wrote,

But the author at once proceeds to add that the principles thus stated [prohibiting proprietors from altering the flow or direction of rivers or streams] in no way serve to prevent or to limit the right of proprietors whose lands border on or are traversed by rivers “from [guaranteeing] themselves against damage by defensive works, constructed either upon the border of the rivers or in the interior of their property, against either the permanent and insensible action of the rivers or streams, or particularly against the damage caused by the accidental or extraordinary overflow of their banks”

Id. (quoting Demolombe, *supra* n. 101, at 34).

103. “It is not prohibited to strengthen one’s bank against the force of a rushing torrent.” Code Just. 7.41.1 (Gordian 239) (translation by author).

would have no cause of complaint because each one is entitled to do the same in his own behalf, as the right of preservation and of legitimate defense is reciprocal, since it is impossible to conceive that the law would impose upon the proprietors bordering upon streams an obligation to suffer their property to be devoured [by accidental or extraordinary overflows] without the power on their part to do anything to protect themselves against the disaster.¹⁰⁴

White's source was thus employed to acknowledge that efforts to protect one's land will nearly always result in alterations of flow that would have the effect of worsening the condition of someone else's property. White did not, however, stop with this acknowledgement. What mattered now was the establishment of proper limits for such a defense of one's lands and rights. To discern these restrictions, White continued to consult, to translate, and to quote from Demolombe. In this way he made Roman law his principal source of guidance as he fashioned the parameters that might be permissibly followed in constructing dams and levees for the protection of private property:

It is necessary, however, that the works constructed [for the purposes stated] do not encroach upon the natural bed of the water courses, that they should be of course constructed in conformity to the police regulations, if any exist, and finally that they are in fact constructed by those who build them for the defense of their own property, because constructions would not be tolerated which had been erected by a proprietor upon his own land without any necessity whatever for his own protection, but with the only and disloyal purpose of injuring the property of others.¹⁰⁵

White then drew from his reading of Demolombe a general rule: there was, he asserted, a "general right to an unrestrained flow of rivers and streams."¹⁰⁶ This right, however, was "qualified by the limitation as to accidental and extraordinary floods."¹⁰⁷ This rule, White continued, prevailed not only in France, but in ancient Rome and in modern Scotland.¹⁰⁸

104. *Cubbins*, 241 U.S. at 364–65 (quoting Demolombe, *supra* n. 101, at 34.) "Et lors même que l'effet de ces travaux, plantations, digues ou autres, serait, comme il arrive presque toujours, de rendre les eaux plus hostiles et plus dommageables aux autres fonds, les propriétaires de ceux-ci ne seraient pas fondés à se plaindre; car chacun peut en faire autant de son côté; ce droit de préservation et de légitime défense est réciproque; et il était impossible que la loi imposât aux propriétaires riverains des fleuves et des rivières l'obligation de laisser dévorer leurs fonds, sans pouvoir rien faire pour les garantir!" Demolombe, *supra* n. 101, at 34.

105. *Cubbins*, 241 U.S. at 365 (quoting Demolombe, *supra* n. 101, at 34). "Ce qu'il faut seulement, c'est que leurs travaux n'anticipent pas sur le lit naturel du cours d'eau; qu'ils soient faits aussi, bien entendu, conformément aux règlements de police, s'il en existe, et enfin, qu'ils aient en effet sérieusement pour but la défense de leurs propres fonds car on ne devrait pas tolérer des ouvrages qui auraient été faits par un propriétaire, sans aucune nécessité, su son propre fonds, et dans la seule et déloyale intentio de nuire aux autres fonds." Demolombe, *supra* n. 101, at 34.

106. *Cubbins*, 241 U.S. at 366.

107. *Id.*

108. *Id.*

Only after this lengthy excursus through foreign sources did White arrive at the state of American case law, about which, he concluded, "much contrariety and confusion exist[ed]." ¹⁰⁹ But despite these problems with the cases, White asserted, one can still discern within them support for the basic proposition he had chosen to defend: that a landowner has the right to protect his property from the "accidental and extraordinary" flooding of an adjacent river or stream. ¹¹⁰ The only question that remained, in White's estimation, was whether the periodic flooding of the Mississippi qualified as accidental or extraordinary. ¹¹¹ Asserting that any flood necessarily depended on a series of coincidences as to place, time, and volume of water, he concluded that the overflows to which the Mississippi was subject met the legal standard he had derived from his reading of Demolombe's commentary. ¹¹² On this reading of the law, the state had every right, if not the affirmative duty, to protect the land from flooding.

Dissected in this manner, White's opinion appears breathtaking in the scope of its reliance on foreign law. He derived the language and phrasing of the legal standard he applied ("accidental and extraordinary") from a French commentary on a French legal text. White's opinion, indeed, bespoke a practical disdain for American case law. The case law was dismissed as hopelessly confused. As an alternative to resolving this confusion through a careful reading of the cases and a search for its binding principles, White turned instead to French and Roman law. White went so far as to borrow the method of the French lawyers. He did not rely principally upon the text of the Code Napoléon, which was not terribly helpful; ¹¹³ instead, he chose to explicate Charles Demolombe's magisterial commentary on the Code. André Tunc has written that "[i]t has often been remarked that the common law is a judge-made law, whereas codified law is a law of law teachers." ¹¹⁴ White himself employed the method of a civilian in discussing Demolombe at such great length and in ultimately deriving the rule of the case from this commentary.

Why did White resort to civilian jurisprudence? The easy answer is that it was familiar to him, that it was second nature, really, for him to take such a step. But if one pressed this point further, one might discover that the American case law, far from being confused, stood largely opposed to his preferred outcome.

Pumpelly v. Green Bay & Mississippi Canal Company involved an action brought in federal court for a violation of the Wisconsin state consti-

109. *Id.*

110. *Id.* at 366–67.

111. *Id.* at 367.

112. *Id.* at 367–68.

113. See *supra* n. 99 and accompanying text.

114. Tunc, *supra* n. 96, at 469.

tution.¹¹⁵ The plaintiff in *Pumpelly* was a landowner whose property was permanently flooded by a dam constructed across a river by a canal company.¹¹⁶ Ascertaining that the Wisconsin constitutional provision was substantially identical to the federal constitution's authorization of eminent domain,¹¹⁷ the United States Supreme Court determined that the permanent flooding caused by defendant's dam amounted to a taking because it had permanently lost all market value.¹¹⁸ Since the dam had been constructed in conformity with a state statute, the Court further determined that compensation was in order.¹¹⁹

Pumpelly differed from *Cubbins* in some crucial respects. It was decided on the basis of state constitutional grounds. It involved land that was permanently flooded. But the principle articulated by *Pumpelly*—that government was responsible to offer compensation where it destroyed a property's value as well as where it claimed actual ownership over it—seemed broad enough to have included the *Cubbins* case within its reach.¹²⁰ Courts and commentators have continued to make much of *Pumpelly*'s broad statement of principle even today. The Supreme Court has continued to make use of *Pumpelly* as a source for its takings jurisprudence.¹²¹ Similarly, legal scholars have continued to understand *Pumpelly* as an important starting

115. *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. 166, 166 (1871).

116. *Id.* at 177.

117. *Id.*

118. *Id.* at 179–80.

119. *Id.* The *Pumpelly* Court grounded its decision ultimately on the Wisconsin Constitution and case law construing it, which was held to require the payment of compensation whenever a public taking occurred. *Id.* at 180.

120. It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to a total destruction without making any compensation, because, in the narrowest sense of that word, it was not taken for the public use. Such a construction would pervert the constitutional provisions into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for the invasion of private right under the pretext of the public good, which had no warrant in the law or practices of our ancestors.

Id. at 177–78.

121. See e.g. *Yee v. City of Escondido*, 503 U.S. 519 (1992) (looking to *Pumpelly* as early support for the principle that “the Takings Clause requires compensation if the government authorizes a compelled physical invasion of the property.” *Id.* at 527.); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) (looking to *Pumpelly* as justifying the holding that “the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings [of condemnation].” *Id.* at 265.); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (In a case involving the introduction of cable television lines in appellant's commercial real estate, the Court held, relying on *Pumpelly*, that “a permanent physical occupation authorized by state law is a taking without regard to whether the State, or instead a party authorized by the State, is the occupant.” *Id.* at 432 n. 9.).

point for modern takings-clause jurisprudence. Writing in the *Columbia Law Review*, William Michael Treanor stated that *Pumpelly* “contained the seeds of the reconceptualization of the Takings Clause that was to occur subsequently, since it explicitly recognized that the harm suffered by *Pumpelly* was a loss of ‘value.’”¹²² David Currie noted that while *Pumpelly* received little attention at the time, it was of great “significance for the future.”¹²³

Had the *Cubbins* Court so desired, *Pumpelly* might have proven to be sound, controlling law in *Cubbins*. Barnette Moses, counsel for the plaintiff, cited *Pumpelly* in his brief.¹²⁴ Moses cited other cases that could also have been used to build a powerful majority opinion favoring the landowners’ interests. “The construction of levees for reclamation of lands from overflow, although referable in a certain sense to the police power, is likewise an exercise of the power of eminent domain, and the owner of property taken for such purpose must be compensated therefor,” Moses argued.¹²⁵ Moses supported this claim with an impressive array of case law.¹²⁶

White countered this claim, first, by distinguishing the facts in *Cubbins*: *Cubbins* did not involve the reclamation of lands from flooding, but the protection of lands against flooding. This was yet another reason for recourse to Demolombe. White had need for finely drawn distinctions and Demolombe provided the sophisticated reasoning he needed to succeed. Demolombe spoke of the freedom of landowners to build defensive bulwarks against accidental and extraordinary flooding. Clearly, in White’s mind, the levees were justified as constitutional for the protection of lands, not reclamation.¹²⁷

122. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 796 n. 74 (1995). As if to underscore the importance of *Pumpelly* to the *Cubbins* case, Treanor observed, “[T]he *Pumpelly* Court carefully limited its holding to cases ‘where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness.’” *Id.* (quoting *Pumpelly*, 80 U.S. at 181).

123. David P. Currie, *The Constitution in the Supreme Court: Limitations on State Power, 1865-1873*, 51 U. Chi. L. Rev. 329, 357 (1984).

124. *Cubbins*, 241 U.S. at 356 (argument for appellant).

125. *Id.* at 353.

126. Two cases cited by Moses appeared especially strong authority for his contention: *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9 (1885) (upholding a New Hampshire state “mill act,” which permitted the erection of dams on non-navigable streams provided adequate compensation was paid to affected land owners); *Ex parte Martin*, 13 Ark. 198 (1853) (in a levee case bearing some similarity to *Cubbins*, the Arkansas Supreme Court wrote, “The right of eminent domain is inherent in the government or sovereign power, and equally so is, or ought to be, in every government of laws, the vested right to his property in the citizen; and the right of eminent domain means that, when the public necessity or common good requires it, the citizen may be forced to sell his property for its fair value. The duty of making compensation may be regarded as a law of natural justice”); see also *Carson v. St. Francis Levee Dist.*, 27 S.W. 590 (Ark. 1894) (again asserting the right of eminent domain in similar circumstances).

127. White, indeed, made short work of the plaintiff’s effort to see the levees as “reclamation.” *Cubbins*, 241 U.S. at 368–69. The Mississippi River valley had become filled with a “great

A further question, however, is raised by White's use of foreign sources and argument: Why did White's colleagues go along with an opinion crafted from French commentaries on the Code Napoléon when American precedents pointing in the other direction were at hand and argued before the Court? Was his argument really so weak on the case law that he was compelled in this direction? Perhaps they did so because of the serious nature of the policies at stake. The levee system had to be sustained. Failure to do so would destroy the commercial value of the lower Mississippi. And neither Court nor Congress was inclined to provide compensation for those whose losses might be deemed speculative or not directly related to an actual governmental taking. The interests at stake were very large. White's reliance on Roman law provided the necessary conceptual apparatus to arrive at a result that must have met with general approval, even in the face of strong contrary case law and judicial precedent. White's use of Roman law, furthermore, helped him to claim for the outcome he desired the mantle of antiquity and universality. The learning of ancient Rome and the best lights of the Continent concurred in allowing the construction of protective barriers without the need to pay compensation to landowners adversely affected. In this way an open path for commercial development was secured.

C. *Cunnius v. Reading School District*¹²⁸

Coffin and *Cubbins* were not the only cases in which White appealed to Roman law as a source of universal principle for the resolution of pressing cases. *Cunnius v. Reading School District* presented a similar case.¹²⁹

Cunnius involved what might today seem like an odd and rather inconsequential legal fiction—the presumption of death. But a century or more ago, in a highly mobile America still expanding westward at an inexorable rate, in a day before birth certificates and easily traceable identifications, the presumption of death must have played a more important role. Certainly, a quick review of databases suggests that presumption of death cases appeared with some regularity in reported decisions.¹³⁰ A revised and expanded version of John Bouvier's *Institutes of American Law* summarized the learning on the subject as it stood in the latter half of the nineteenth century:

When a person has been absent for a long time, unheard from, the law will presume him to be dead: it has been adjudged, that after

population." *Id.* at 368. At stake were "its farms, its villages, its towns, its cities, its schools, its colleges, its universities, its manufactories, its network of railroads, some of them transcontinental . . ." *Id.* Plaintiff's contention, White asserted, was "at war with" the plans of the affected state governments and Congress itself. *Id.* at 369.

128. 98 U.S. 458 (1905).

129. *Id.*

130. A search of the LexisNexis database of reported decisions prior to May 30, 1905, when the *Cunnius* case was decided, indicates approximately 400 reported decisions.

twenty-five years; twenty years; in another case, sixteen years; fourteen years; twelve years; and seven years; the presumption of death arises. It seems to be agreed, that after an absence of seven years, without being heard from, the presumption of death is sufficient to treat the absentee's property as if he were dead; though, like every other presumption, this may be rebutted by showing that the absentee is alive.¹³¹

The presumption of death might be expected to work well where the absent party actually was dead or had at least taken up a new life and livelihood far from his original home and family with no intention of returning. Reported cases, however, demonstrate the difficulties that arose where the party presumed to be deceased returned home only to find that he or she had in fact been prematurely declared dead by competent authority and that all sorts of unfortunate legal consequences flowed from this determination.¹³²

At issue in *Cunnius* was a state statute that made certain property arrangements upon a determination that a party gone from a jurisdiction for a long time should be presumed dead. The statute permitted one entitled to take under the state's estate laws to petition the state's orphans' court for letters of administration in cases where an absentee had not been heard from in seven years, thus initiating the process of probating the absentee's estate.¹³³ The statute required the local registrar of wills to post notice of the impending proceeding and, where no response was forthcoming, authorized letters of administration to be issued to those entitled to receive them.¹³⁴ The estate might be distributed under such circumstances because the absentee was presumed dead and the property was accordingly subject to the laws of descent and distribution.

The plaintiff, Margaret Cunnius, domiciled in Reading, Pennsylvania, owned the right to lifetime income from a piece of property situated in that town.¹³⁵ Although legal title to the property passed to the Reading, Pennsylvania school district, Cunnius continued to retain the right to income at the time of her disappearance from Pennsylvania in April 1888.¹³⁶ In

131. John Bouvier, *Institutes of American Law* vol. I, 234 (Daniel A. Gleason ed., rev. ed., Little, Brown & Co. 1880). Simon Greenleaf treats the presumption of death as a matter for the law of evidence. In the case of an absentee, there is a presumption of life for the first seven years of the person's absence, but the presumption shifts to one of death after that point in time, and the burden of proof is placed on the one seeking to establish that the absentee remains alive. Simon Greenleaf, *A Treatise on the Law of Evidence* vol. 2, 280-81 (Edward Avery Harriman ed., 16th rev. ed., Little, Brown & Co. 1899).

132. See e.g. *Beam v. Copeland*, 14 S.W. 1094 (Ark. 1890) (estate settlement); *N.Y. Life Ins. Co. v. Holck*, 151 P. 916 (Colo. 1915) (insurance settlement); *Williams v. Williams*, 23 N.W. 110 (Wis. 1885).

133. *Cunnius*, 198 U.S. at 458-59.

134. *Id.* at 459.

135. *Id.* at 460.

136. *Id.* at 461.

March, 1897, nearly nine years later, her son, who remained in Reading, petitioned for letters of administration on the basis of his mother's presumed death and claimed as part of his mother's estate the accrued interest from 1888 to 1897.¹³⁷ A year later, in 1899, Margaret reappeared, having in the meantime resided in Sacramento, California, where she had remarried.¹³⁸ She now sought payment of the accrued interest from the school district.¹³⁹ The school district raised the statute as a defense to payment.¹⁴⁰ Cunnius responded by challenging the constitutionality of the statute under the Due Process Clause of the United States Constitution.¹⁴¹

Caleb Bieber represented Cunnius in the United States Supreme Court. The plaintiff, he asserted, "was deprived of her property without due process of law."¹⁴² At stake, he continued, were no great interests or policies that required vindication at the expense of his client. All that was on the table were the mere private rights of one individual: "If her departure from Pennsylvania and her omission to demand her arrearages for a period of eleven years worked an injury to any one, it was to herself alone, and not to any public right such as would bring this case within the police powers of the State."¹⁴³

Cunnius was under no obligation to remain in Pennsylvania.¹⁴⁴ Free to come and go as she pleased, Bieber asserted, she should not lose title to eleven years of accrued income and interest merely because she delayed in claiming it. The only proper obstacle to her claim was the statute of limitations barring her claim, and the statute had not yet run.¹⁴⁵ Bieber cautioned the Court not to engage in large abstractions about the authority and power of the state over its courts.¹⁴⁶ "[T]he real point at issue," Bieber asserted, "is

137. *Id.*

138. *Id.*

139. *Id.* It seems from the reported case that Cunnius did not bring suit against her son. Perhaps the son had already spent the income owing to Cunnius; perhaps also Cunnius felt obliged by ties of kinship to leave her son out of the litigation.

140. *Id.* at 461-62.

141. [A]s she was alive when the proceedings for administration were taken in the state court, those proceedings and the law which authorized them were repugnant to the 14th Amendment to the Constitution of the United States. She, moreover, contended, even although there was power in the state to provide by law for the administration of the property of an absentee, the particular law in question was repugnant to the 14th Amendment to the Constitution, as it did not provide for adequate notice, and because the law failed to furnish the necessary safeguards to give it validity.

Id. at 462.

142. *Cunnius*, 198 U.S. at 462.

143. *Id.* at 463.

144. *Id.*

145. *Id.* at 462.

146. "To decide abstractly whether a State can by a statute clothe its courts with certain powers would not be to the point, because the same act of assembly may be valid as to some persons and the reverse as to others." *Id.* at 464.

the effect of the operation of those powers on the rights of the party before the court.”¹⁴⁷

Frederick W. Nicolls, a Pennsylvania appellate advocate of some regional stature but whose only appearance in the United States Supreme Court was in *Cunnius*, preferred to focus the Court’s attention on the power of the legislature: “The legislature can make a valid grant of jurisdiction to its courts over any legitimate subject matter, provided the subsequent steps be according to law. Such a grant of authority the Pennsylvania assembly directly conveyed by the act [in question].”¹⁴⁸

Nicolls’s argument, of course, begged the question raised in Bieber’s brief for appellant: Was the exercise of the state’s authority legitimate with respect to *Cunnius*? Nicolls asserted that it was but he made no concomitant effort to prove his point. Nicolls instead asserted that, contrary to Bieber’s claim, large public interests were implicated by presumption of death statutes: “The grant to a court of jurisdiction over the estates of those who by reason of a long absence are probably dead would seem a highly beneficial, and, if the process were proper, a legal and rational, exercise of legislative discretion.”¹⁴⁹ Decisions of American tribunals had sustained similar statutes. The most powerful of Nicolls’s precedents was *Arndt v. Griggs*,¹⁵⁰ which spoke directly of “[t]he power of the state to regulate the tenure of real property . . . and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, [as] undoubted.”¹⁵¹ Nicolls thus sidestepped Bieber’s challenge to the legitimacy of the state’s actions with respect to *Cunnius* by focusing on the public necessity of ensuring that title to real estate passed seamlessly in accord with the law of estates and trusts.

The Supreme Court handed down judgment in favor of the Reading school district. Once again, one sees a familiar pattern at work in White’s opinion, written for a unanimous Court. After a one-paragraph nod in the direction of American case law,¹⁵² White reviewed the argument of plaintiff’s counsel that the statute was unconstitutional.¹⁵³ In addition to summarizing some of the material quoted above regarding the facts of the case and

147. *Id.*

148. *Id.* at 465.

149. *Id.* at 466.

150. 134 U.S. 316 (1890).

151. *Id.* at 321. The other two cases cited by Nicolls were: *Roller v. Holley*, 176 U.S. 398 (1900), which similarly, though more broadly, asserted that “[the state] has control over property within its limits,” *id.* at 404; and *Boswell’s Lessee v. Otis*, 50 U.S. 336 (1850), asserting “[t]he property of an individual is subject, in a certain sense, to the law of the State in which it is situated,” *id.* at 349.

152. *Cunnius*, 198 U.S. at 467–68.

153. *Id.* at 468.

the arguments of counsel,¹⁵⁴ White found pertinent to his opinion the strong defense of individual rights made by plaintiff's counsel:

In a word, the case before the court is one in which the private property of one person was, without her knowledge or consent, transferred to another who in reality had no shadow of a right to it, by virtue of an *ex parte* proceeding of which the owner had no lawful notice. Is it possible that such a manifest infringement of the fundamental and inherent rights which belong to every person in the use and enjoyment of his private property can be construed to be due process of law?¹⁵⁵

White, however, did not accept this statement as a proper summary of the issues before the Court; rather, he immediately perceived in this line of argument a "challenge [to] the authority of the State,"¹⁵⁶ which he accordingly sought to put down. Plaintiff's counsel, White asserted, had not only claimed that the state's failure to provide notice amounted to a deprivation of due process of law, but made the more radical claim that "there was a complete want of [State] power to do so."¹⁵⁷

White addressed the question of state authority first. It is in this part of his analysis that a modern reader finds, once again, repeated and sustained recurrence to the works of civilian writers. "The question," as White understood it, "was not the wisdom of the statute, but whether it was so beyond the scope of municipal government as to amount to a want of due process of law."¹⁵⁸ He thought the "solution of this inquiry" lay in understanding the authority of the state over the regulation of wills and estates.¹⁵⁹ White eschewed an abstract analysis of the problem.¹⁶⁰ Rather, he asserted, he wished to examine empirically the question whether governments have actually taken the measures challenged by plaintiff.¹⁶¹ In a sense, his goal was deliberately comparative. If jurisdictions at widely varying times and places—not only American but foreign also—have claimed the authority challenged by the plaintiff, the plaintiff's argument must fail.¹⁶²

154. *Id.* (quoting material found at *supra* n. 143 and accompanying text).

155. *Id.* (quoting brief of plaintiff's counsel).

156. *Id.*

157. *Id.*

158. *Id.* at 469.

159. *Id.*

160. "We do not pause to demonstrate, by original reasoning, that the right to regulate concerning the estate or property of absentees is an attribute, which, in its very essence, must belong to all governments . . ." *Id.*

161. "[W]e propose rather to test the question by ascertaining how far such authority has been deemed a proper governmental attribute in all times and under all conditions." *Id.*

162. If it be found that an authority of that character has ever been treated as belonging to government and embraced in the right to protect and foster the well-being and order of society, it must follow that that which has at all times and places been conceded to be within the power of government, cannot, in reason, be said to be so beyond the scope of governmental authority that the exertion of such a power must be held to be a want of due process of law.

To resolve this question, White immediately turned to the teaching of eighteenth- and nineteenth-century French jurists working in the Romanist tradition.¹⁶³ To be sure, White conceded the classical Roman law, and even its more recent civilian adaptations, was not well developed in its treatment of an absentee's estate.¹⁶⁴ White, however, found value in the works of two French Romanists whose writings stood as evidence for the state of civilian jurisprudence on the subject. Charles-Bonaventure-Marie Toullier (1752–1835) did nothing more than recommend the need to balance conflicting interests. It is true, Toullier asserted, that prolonged absence might interrupt or suspend civil rights, but he also indicated that there was a need to protect and conserve the rights of persons legitimately living away from the jurisdiction.¹⁶⁵ Alexandre Duranton (1783–1866), a second source consulted by White, merely called attention to the failure of classical Roman law to develop a body of law “on the subject of absence” (*au sujet des absents*) and speculated that this lacuna was the result of the ancient Roman tendency to regard anyone taken captive in battle to be accounted as civilly dead.¹⁶⁶

These sources were hardly strong support for White's thesis that it was within the scope of governmental power to provide for the distribution of estates in presumption of death cases. Indeed, standing alone, they might be read as supporting a conclusion that the law was barely developed at all in this area.

White, however, followed these texts with an analysis of the Code Napoléon, especially as explicated by Demolombe.¹⁶⁷ Demolombe, White noted, “expounds the fundamental conceptions from which the power of government on the subject is derived”:

Three characters of interest invoke a necessity for legislation concerning this difficult and important subject. First. The interest of the person himself who has disappeared. If it is true that generally speaking every person is held at his own peril to watch over his own property, nevertheless the law owes a duty to protect those who from incapacity are unable to direct their affairs. It is upon this principle of public order that the appointment of tutors to minors or curators to the insane rests. It is indeed natural to presume that a person who has disappeared, if he continues to exist, is prevented from returning by some obstacle stronger than his own will, and which, therefore, places him in the category of an incapable person, whose interest it is the duty of the law to pro-

163. *Id.*

164. *Id.*

165. Charles-Bonaventure-Marie Toullier, *Le Droit Civil Français* vol. I, liv. I, titre IV, *Des Absents*, § 379, 247 (16th ed., Paris 1846); cf. *Cunnius*, 198 U.S. at 469.

166. Alexandre Duranton, *Cours de Droit Français Suivant le Code Civil* vol. I, liv. I, titre IV, *Des Absents*, § 384, 305–06 (3d ed., Paris 1834).

167. *Cunnius*, 198 U.S. at 470.

tect. And it is for this reason that the provisions as to absence in the code are placed in the chapter treating of the status of persons because the absentee, in the legal sense, is a person occupying a peculiar legal status. Second. The duty of the lawmaker to consider the rights of third parties against the absentee, especially those who have rights which would depend upon the death of the absentee. Third. Finally, the general interest of society which may require that property does not remain abandoned without some one representing it and without an owner. . . .¹⁶⁸

Embedded within this statement of the state's solicitude and authority over the property of an absentee is a robust conception of the state's authority to see to the necessities of public welfare.¹⁶⁹ The state is empowered, on this reading of the western political tradition, to see to the needs of those incapable of caring for themselves and to look after the "general interest of society," understood as the need to protect not only the liberty interests of the individual property owner, but the social need that ownership be clearly identifiable and that the responsibility for the care and upkeep of the property in question be properly allocated.¹⁷⁰

Caleb Bieber, in his argument for the plaintiff, had put forward a rights-based argument deeply grounded in late nineteenth- and early twentieth-century conceptions of robust individual economic rights and minimalist state authority.¹⁷¹ Herbert Spencer, William Graham Sumner, and other late nineteenth-century political theorists had come to view the state as having no power beyond its responsibility to maximize and secure the freedom of the individual, especially in the economic sphere.¹⁷² Bieber's sharp dis-

168. *Id.* at 470-71.

Trois sortes d'intérêt appelaient sur cette situation difficile et importante toute law sollicitude de la loi:

1° L'intérêt de la personne elle-même qui a disparu. S'il est vrai qu'en général, chacun est tenu de veiller, à ses riosquet et périls, au soin de ses affaires, la loi doit pourtant au protection a l'incapacité de ceux qui ne peuvent pas gouverner eux-mêmes leur fortune. C'est sur ce principe d'ordre public qu'est fondée la tutelle des mineurs et des interdits; or, il est naturel de présumer que la personne qui a disparu, si elle existe encore, est retenue et empêchée par quelque obstacle plus fort que sa volonté; donc, il faut dès lors la mettre au nombre des incapables, dont la loi protège elle-même les intérêts. Et voilà bien ce qui explique la place de ce titre dans le livre Ier du Code Napoléon, consacré à l'état des personnes; e'est qu'en effet, l'absence, ainsi entendue, constitue une modification dans l'état même de la personne (citation omitted);

2°. L'intérêt des tiers, de ceux-là surtout qui ont des droits auxquels le décès prouvé de l'absent donnerait ouverture;

3° Enfin, l'intérêt général de la société, qui exige que les biens ne restent pas trop longtemps abandonnés, sans représentant et sans maître

Demolombe, *supra* n. 96, at vol. II, liv. I, titre IV, *Exposition Générale*, 2-3.

169. *Cunnius*, 198 U.S. at 470-71.

170. *Id.*

171. *Id.* at 462-64.

172. See generally Herbert Hovenkamp, *The Cultural Crises of the Fuller Court*, 104 Yale L.J. 2309 (1995); Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 Stan. L. Rev. 379 (1988).

inction between private and public (Cunnius's failure to claim her accrued income harmed no one but herself, he alleged) was simply one manifestation of this way of conceiving of the state's authority over the person.¹⁷³ Bieber's argument stood in sharp contrast with White's claims on behalf of the state's authority, as evidenced by his use of the lengthy quotation from Demolombe. It is not surprising, perhaps, that White engaged in a vigorous and sustained effort to refute the plaintiff's effort to limit state power in presumption of death cases. White clearly viewed the Pennsylvania statute, in short, as nothing more than a legitimate exercise of the state's police power.¹⁷⁴

This minimalist understanding of the state's authority over the freedom of the person would have its apotheosis in *Lochner v. New York*, decided in April 1905, in the same Supreme Court term as *Cunnius* and handed down only five weeks before the *Cunnius* opinion.¹⁷⁵ It should come as no surprise, perhaps, to learn that White, with his more robust conception of the powers of the state to see to the general social welfare, sided with the dissenters in *Lochner*. Joining the dissenting opinion of the elder John Marshall Harlan, White assented to the proposition that liberty of contract might "be subjected to regulations designed and calculated to promote the general welfare or to guard the public health, the public morals, or the public safety."¹⁷⁶ Although the issues implicated by *Lochner* were very different from *Cunnius*, there was present in both cases a strong understanding of the right and responsibility of the state to see to the common good. And in each case, Justice White was prepared to align himself with the state as guarantor of the public welfare.

III. CONCLUSION

This study of Edward Douglass White's use of Roman law as a ground of decision in constitutional cases raises important questions about juristic conceptions of sources of law in the late nineteenth and early twentieth centuries. This is not the venue, however, for exploring such a large but compelling theme. I hope to return to this question in an expanded, book-length treatment of White and his contemporaries in the 1890s to the 1920s.

What I should like to focus on in my conclusion is the relationship of this study with the larger theme of the symposium: American Exceptionalism. It has been a widely held assumption of common lawyers since at least the days of Sir Edward Coke that the common law was a repository of

173. *Cunnius*, 198 U.S. at 462-64.

174. *Id.* at 469. White thus found it an easy matter as well to determine that the process used to terminate Cunnius's right to receive her payments was constitutional. A seven-year waiting period, and a procedure hedged in with notice requirements, sufficed to satisfy White's understanding of the requirements of the Due Process Clause. *Id.* at 476-77.

175. *Lochner v. New York*, 198 U.S. 45 (1905).

176. *Id.* at 67 (Harlan, J., dissenting).

juristic principle and wisdom of unique, almost transcendent, significance. England was a chosen nation, on this understanding of the English legal past, and her law was similarly divinely blessed and authorized.

This attitude of almost contemptuous superiority deeply colors commonly held assumptions about the role of foreign law in contemporary judicial decision making, as the introduction of this paper makes clear. In a sense, this air of superiority reflects larger, pernicious currents of thought coursing through contemporary American culture. The twin-born evils of triumphalism and provincialism are today detectible in many corners of American society. This paper suggests that such a sense of superiority did not invariably characterize American constitutional thought. Indeed, Western constitutionalism was once seen as a unity. The American constitutional experiment was accordingly understood as a recent participant in a tradition that extended back in time to the Middle Ages, indeed, to the ancient world itself. Edward Douglass White fully appreciated this reality.